A **KRISHNAN GOPALAN**

v.

PERNIAGAAN MULA BUMI SDN BHD

B HIGH COURT MALAYA, MELAKA
KAMALUDIN MD SAID JC
[ORIGINATING SUMMONS NO: 24-350-2000]
2 JANUARY 2013

C ***CIVIL PROCEDURE:*** *Costs - Taxed costs - Company wound-up - Failure to pay taxed costs - Whether litigant entitled to priority of payment - Whether compliance order obtained against liquidator to settle taxed costs - Companies Act 1965, ss. 264, 291 & 292*

D ***COMPANY LAW:*** *Winding-up - Priorities - Taxed costs - Whether litigant entitled to priority of payment - Whether compliance order obtained against liquidator to settle taxed costs - Companies Act 1965, ss. 264, 291 & 292*

E After having obtained the leave of court to institute legal action against the wound-up respondent company ('the company'), the plaintiff settled his action with the company and then had his costs taxed. When the company failed to pay the taxed costs as requested, the plaintiff applied to court for a compliance order against the company's liquidator. However, the Registrar refused F the application. Hence, the plaintiff appealed to the judge. The plaintiff argued that since the costs were ordered in proceedings in which the liquidator was involved after the winding-up had commenced, there was no necessity for him to prove his debt to the liquidator under s. 291 of the Companies Act 1965 ('the G Act'). The plaintiff further alleged that since the taxed costs were determined after contest by the liquidator, the taxed costs were a first charge in the liquidation and, by that fact, had priority of payment.

H **Held (dismissing appeal with costs):**

(1) The plaintiff was not entitled to any priority of payment of his costs and/or an order to compel the liquidator to pay the said costs. The Act did not provide priority for the plaintiff's taxed I costs as it did not come under the priority ranking under s. 292 of the Act. (paras 13, 15 & 23)

(2) As the plaintiff's taxed costs had to be paid out of the property of the company, s. 264 of the Act applied in that subject to the provisions of the Act as to preferential payments, the company's property shall on its winding-up be applied *pari passu* in satisfaction of its liabilities. There was no *lacuna* or ambiguities in the law relating to priorities nor was there any change in the law on the status of wound-up companies. (paras 12 & 22)

Case(s) referred to:

Abdul Samad Alias (Receiver and Manager of Rajiv Enterprises Sdn Bhd) v. Government of Malaysia & 2 Ors [1996] 4 CLJ 123 FC ***(refd)***

Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation) [1995] 3 CLJ 316 SC ***(refd)***

Kenneth Teh Ah Kiam & Chin Kwai Yoong v. Ketua Pengarah Jabatan Kastam & Eksais & Ors [1998] 1 CLJ 183 FC ***(refd)***

Markcon Sdn Bhd (In Liquidation) v. Resilient Construction Sdn Bhd and Labtec Sdn Bhd & Anor (Opposing Creditors) [1994] 1 CLJ 271 HC ***(refd)***

Wong Pot Heng v. Zainal Abidin Putih & Anor [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC ***(refd)***

Zainal Abidin Putih & Anor v. Che Wan Dvpt Sdn Bhd [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381 SC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 211, 220, 264, 281, 291, 292(1)(a), 351(2)
Companies (Winding-up) Rules 1972, rr. 78, 79, 82
Rules of the High Court 1980, O. 59 r. 2(2)

Supreme Court Practice 1979 [UK], O. 62 r. 2

For the plaintiff - Krishnan; M/s Krishnan & Co
For the defendant - Andre Wee Heng Leong; M/s Yap Koon Roy & Assocs

Reported by Ashok Kumar

JUDGMENT

Kamaludin Md Said JC:

The Facts Of The Case

[1] The respondent here was developing a housing project known as Taman Bacang Baru. The plaintiff had purchased two units of the single-storey houses and made payment to the plaintiff. At that time, the respondent company was functioning

well. Subsequently, the company had financial problems resulting in Maybank Bhd appointing a receiver and manager under the debenture given to the bank by the company. The housing project was not completed and came to a standstill. The receiver and manager took over the control of the respondent company and completed the housing project. The receiver and manager ignored the prior knowledge given by the plaintiff to him on the purchase of the two units of the single-storey houses by the plaintiff and sold them to some third parties. After this, the High Court on a petition presented by Maybank Bhd made a winding-up order against the respondent company. A liquidator was appointed. The plaintiff came to know about this in the year 2000 and since there is a winding-up order against the company, the plaintiff made an application to court for leave to institute legal proceedings against the company. The company was represented by the present solicitors. The application was allowed with costs. The company was sued. The matter was settled between the parties. The costs was taxed. Solicitors represented at the taxation. The allocatur was extracted and served on the solicitors who are the present ones. Since no payment was made as requested, an application was made to court for a compliance order by the liquidator. The plaintiff cannot execute because the company is in winding-up position under the liquidator who was appointed by court. The Registrar refused the application for a compliance order. Hence, this appeal.

Whether Compliance Order By The Liquidator Can Be Issued For The Taxed Cost

The Plaintiff's Case

[2] The plaintiff's main argument is that his taxed costs should be given priority and must be paid by the company. Here the costs was ordered after the court winding-up order. The winding-up order was made in June, 1998 while the issue on costs here was ordered in 2000. Therefore, the liquidator was involved in this matter and as such there is nothing to prove to him.

[3] According to him, the filing of proof of debt does not arise under s. 291 of the Companies Act 1965 because the matter here occurred after the liquidator has taken office and he is the one who has full knowledge of the costs incurred. The application for leave here was fought over by him through his lawyers. Since it is

charge incurred by the liquidator, it is a first charge on the assets of the company in liquidation and therefore, he has got to pay it (taxed costs).

[4] To support his claim, the plaintiff relied on passages in the White Book 1979 at pp. 952 and 953 where it is stated that a litigant (the plaintiff here) who has obtained costs takes priority over the general costs of liquidation. It is quite clear that the order that is sought here against the liquidator is to compel the company to pay the costs and interest that has been ordered against the company. He submitted the costs ordered here was made under s. 351(2) of the Companies Act, 1965.

[5] The company has the money to pay. This could be seen from the exhibits attached to the liquidator's affidavit. The plaintiff urged the court to make the order for compliance. If not, it would look very odd.

[6] In conclusion, the plaintiff said, what is claimed here is taxed costs after it had been contested by the company's solicitors and therefore the more the compliance order should be made.

Respondent's Reply

[7] The respondent submitted that the plaintiff's application was ambiguous. Was it for:

(i) an order to compel the liquidator to pay the costs and interest out of the assets of the company; or

(ii) an order for the liquidator to pay the costs and interest personally (please see para. 9 of the plaintiff's affidavit in reply affirmed to on 12 April 2012)?

[8] If the plaintiff's application was for the liquidator to pay the costs and interest out of the assets of the company:

(i) (a) every creditor shall prove his debt by delivering to the liquidator an affidavit verifying the debt, stating whether the creditor is or is not a secured creditor, together with the prescribed filing fee.

- Rule 78 of the Companies (Winding-up) Rules, 1972 [CWUR]:

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> In a winding-up by the Court every creditor shall prove his debt, unless the Judge in any particular winding-up shall give directions that any creditors or class of creditors shall be admitted without proof.

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- Rule 79 CWUR:

> A debt shall be proved in any winding-up by delivering or sending to the liquidator an affidavit verifying the debt together with the prescribed filing fee.

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- Rule 82 CWUR:

> An Affidavit proving a debt shall state whether the creditor is or is not a secured creditor.

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(b) in the present case, the plaintiff has failed to do so despite being asked to by the liquidator;

(c) the plaintiff claims that the costs were incurred after the winding-up and therefore he need not file a proof of debt;

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(d) this is in direct conflict with the requirement that in every winding-up, all debts payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company. Section 291 of the Companies Act 1965 states the following:

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> (1) In every winding-up ... all debts payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company ...

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> (2) Subject to section 292, in the winding-up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive

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> dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

(ii) (a) in any event, the property of a company shall, on its winding-up, subject to the provisions of the act as to preferential payments, be applied *pari passu* in satisfaction of its liabilities. See s. 264 of the Companies Act, 1965 states the following:

> Subject to the provisions of this Act as to preferential payments the property of a company shall, on its winding up, be applied *pari passu* in satisfaction of its liabilities, and subject to that application shall, unless the articles otherwise prove, be distributed among the members according to their rights and interest in the company.

(b) the plaintiff claims that he has a first charge on the liquidator/assets of the company as the costs were awarded subsequent to the winding-up of the company;

(c) the plaintiff's claim is untenable. See:

- Section 292 of the Companies Act 1965:

> (1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts:
>
> (a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 281;
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> (b) secondly, all wages and salary ...;
>
> (c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;
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> (d) fourthly, all remuneration payable to any employee in respect of vacation leave ...;

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(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds ...; and

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(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding-up or assessed at any time before the time fixed for the proving of debts has expired ...

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(g) so far as the assets of the company available for payment of general creditors are insufficient to meet any preferential debts specified in paragraphs (1)(b), (d) and (e) and any amount payable in priority by virtue of subsection (3), those debts shall have priority over the claims of the holders of debentures under any floating charge created by the company, and shall be paid accordingly out of any property comprised in or subject to that charge.

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- and the judgment of Gunn Chit Tuan SCJ in the Supreme Court case of *Zainal Abidin Putih & Anor v. Che Wan Dvpt Sdn Bhd* [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381 at p. 389, where it was held that:

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> taxed costs is part of a judgment debt which therefore can only rank *pari passu* with other unsecured liabilities;

- also, per Mohd Azmi SCJ delivering the judgment of the Supreme Court in *Wong Pot Heng v. Zainal Abidin Putih & Anor* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 at p. 320:

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> When there is an express statutory provision relating to priority, we cannot displace or improve it by resorting to decided cases of common law jurisdiction unless there is a *lacuna* or ambiguities in our law ...

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- and, in the case of *Markcon Sdn Bhd (In Liquidation) v. Resilient Construction Sdn Bhd and Labtec Sdn Bhd & Anor (Opposing Creditors)* [1994] 1 CLJ 271, where the liquidator in that case had applied, in the name of a

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wound-up company, to wind-up another company, and the petition was dismissed with costs to be paid by the liquidator of the wound-up company; the costs were taxed and two opposing creditors had applied for the costs to be paid by the liquidator personally, and the solicitors for the liquidator had informed the court that the wound-up company did not have money to pay costs to anyone. Dato' James Foong, J (as he then was) had held that:

(1) the principle in *Zainal Abidin Putih & Anor v. Che Wan Dvpt Sdn Bhd* [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381; [1992] 2 MLJ 233, although in respect of receivers, was also applicable to liquidators;

(2) the taxed costs were awarded against the company; and

(3) the taxed costs were not ordered to be paid in any event and/or in priority by the liquidator.

(d) even the Government of Malaysia is bound by s. 292 of the Companies Act 1965 where their claim to sales tax already collected but not set aside in a separate account can only be paid according to the priority set out in s. 292. See the Federal Court judgments in *Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation))* [1995] 3 CLJ 316 at p. 325; *Abdul Samad Alias (Receiver and Manager of Rajiv Enterprises Sdn Bhd) v. Government of Malaysia & 2 Ors* [1996] 4 CLJ 123 at p. 135 and *Kenneth Teh Ah Kiam & Chin Kwai Yoong v. Ketua Pengarah Jabatan Kastam & Eksais & Ors* [1998] 1 CLJ 183 at p. 194.

(iii) (a) as at 25 October 2011, the company only had RM12,326.25 whereas the estimated amount of debts or claims remaining for proof is RM258,845.79 (see exh. "A" to the affidavit in reply affirmed to on 28 March 2012 (encl. 43));

(b) contrary to the plaintiff's allegations, the accounts exhibited as exh. "A" are proper and valid accounts of the company (see s. 281 of the Companies Act 1965 and the only party who can question the accounts is the official receiver); and

A (c) in the premises, this Honourable Court ought not to order the liquidator to pay the costs and interest out of the assets of the company.

[9] If the plaintiff's application is for the liquidator to pay the B costs and interest personally:

(i) the order to pay costs was against the defendant company, not the liquidator personally;

(ii) the liquidator was never a party to the proceedings;

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(iii) the liquidator was appointed by the court and is an officer of the court;

(iv) the liquidator did not cause unnecessary proceedings or litigious expenses. It was the plaintiff who had brought the D action against the defendant;

(v) therefore, this Honourable Court ought not to exercise its discretion to make any adverse order against the liquidator (see the Supreme Court case of *Zainal Abidin Putih & Anor v. Che Wan Dvpt Sdn Bhd* [1992] 3 CLJ 1539; [1992] 1 CLJ E (Rep) 381 at p. 389, *supra*).

Findings Of The Court

F **[10]** I have not loss sight of the fact that there is a winding-up order against the respondent company and a liquidator was appointed. Since there is a winding-up order against the company, it is trite law that the provisions in Part X of the Companies Act 1965 on winding-up and the Companies (Winding-up) Rules 1972 G shall apply. I am in agreement with the respondent's counsel submission. The only argument presented before the court which the plaintiff strongly believed that his case is unique which, does not require the filing of proof of debt under s. 291 of the Companies Act 1965 is that the plaintiff made an application to H court for leave to institute legal proceedings against the company and the application was allowed with costs by the court. The costs were taxed. Since no payment was made as requested, it is appropriate for the court which gave such order of costs to issue a compliance order to the liquidator to pay the plaintiff's taxed costs.

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[11] The argument by the plaintiff is quite forceful in the sense that, the matter here occurred after the liquidator has taken office and he is the one who has full knowledge of the costs incurred. Therefore, the filing of proof of debt would not be necessary or does not apply. Under O. 62 r. 2 of the Supreme Court Practice 1979 where the powers and discretion of the court as to costs under s. 50 of the Act, which provides that the costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the court and that the court shall have full power to determine by whom and to what extent the costs are to be paid. The commentaries of the words "liquidator" under O. 62 r. 2 where it mentioned there, "A successful litigants with a company who has obtained an order for payment of his costs out of the assets of the company is not to be indefinitely postponed, and is entitled to payment in priority to the general costs of liquidation". He also referred to s. 351 of the Companies Act 1965 which says "The costs of any proceeding before a court under this Act shall be borne by such party to the proceeding as the court may, in its discretion, direct".

[12] What the plaintiff was trying to say here is, the matter on claims present and future under s. 291 of the Act must and should mean to the situation prevailing at the time of making the winding-up order. It certainly does not cater for a situation arising after the liquidator is appointed. Hence, it is submitted that s. 291 has no application whatsoever to the taxed costs to be paid here. This is because the expenses incurred by the liquidator is a first charge on the liquidation. I have considered this argument and I am of the view that since the respondent's company has been put under the charge of liquidator, the provisions in Part X of the Companies Act 1965 on winding-up and the Companies (Winding-up) Rules 1972 shall apply. Section 211 of the Act clearly provides the winding-up of a company may be either by the court or voluntary. In this case the High Court on a petition presented by Maybank Bhd made a winding-up order against the respondent company. Section 264 provides the preferential payments the property of a company shall, on its winding-up, be applied *pari passu* in satisfaction of its liabilities, and subject to that application shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company. Both provisions are very clear on the position of property or assets of a winding-up company. The plaintiff's taxed costs if it is to be paid, must come from the respondent's

company account, which is the property of the company. Therefore, s. 264 applies and the preferential payments of the property of the respondent's company for the plaintiff shall, be applied *pari passu*.

[13] The Companies Act 1965 does not provide priority for the plaintiff's taxed costs except in circumstances provided under s. 292 of the Act that costs and expenses of the winding-up including the taxed costs of a petitioner payable under s. 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to s. 281 shall be paid in priorities to all other unsecured debts.

[14] The plaintiff argued that the liquidator and counsel representing the company under liquidation, appeared in court and took part in a proceeding where the taxed costs were awarded may well be circumstances fall under s. 292 of the Act. The order to pay costs was against the defendant company, not the liquidator personally. It is noted that the liquidator was never a party to the proceedings. The liquidator was appointed by the court and is an officer of the court and the liquidator did not cause unnecessary proceedings or litigious expenses. It was the plaintiff who had brought the action against the defendant. However, it is my considered opinion that s. 292(1)(a) does not apply to the plaintiff's case.

[15] It is my opinion that in every winding-up, all debts payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company. (Section 291 of the Companies Act 1965). The plaintiff's taxed costs does not come under priority ranking under s. 292 of the said Act. The case of *Zainal Abidin Putih & Anor v. Che Wan Dvpt Sdn Bhd* [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381 at p. 389, which I am bound, where it was held that:

> taxed costs is part of a judgment debt which therefore can only rank *pari passu* with other unsecured liabilities;

[16] The contention of the plaintiff that he has found support of his claim by reference to the White Book (The Supreme Court Practice 1979) is misguided.

[17] Order 62 r. 2 of the Supreme Court Practice 1979 reads as follows:

> (1) This Order shall have effect in relation to all criminal proceedings in the Queen's Bench Division or Court of Appeal.
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> (2) Where by virtue of any Act the costs of or incidental to any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under any Act, not being proceedings in the Supreme Court, are taxable in the High Court, the following provisions of this Order, that is to say, rule 7, (4) and (5), rule 8(6), rules 14 to 16, rule 17(1), rule 18, rule 21 (except paragraph (3)), rules 22 to 26 and rules 33 to 35, shall have effect in relation to proceedings for taxation of those costs as they have effect in relation to proceedings for taxation of the costs of or arising out of proceedings in the Supreme Court, other than proceedings in the Family Division.
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> (3) This Order shall have effect subject to sections 47 and 60 of the County Courts Act, 1959 (which limit the costs recoverable in relation to certain proceedings which could have been commenced in a county court) and to any other Act of Parliament.
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> (4) The powers and discretion of the Court as to costs under section 50 of the Act, (which provides that the costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that the Court shall have full power to determine by whom and to what extent the costs are to be paid), and under the enactments relating to the costs of criminal proceedings to which this Order shall be exercised subject to and in accordance with this Order.

[18] The relevant provision prevailing at the time of the award of costs and the plaintiff's application and appeal herein is O. 59 r. 2 of the Rules of the High Court 1980, which provides as follows:

> (1) Where by virtue of any written law the costs of or incidental to any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under written law, not being proceedings in the High Court, are taxable in the High Court, the following provisions of this Order, that is to say, rule 7(4) and (5), rule 8(6), rules 13 and 14, rule 15(1), rule 16, rule 20 to 25 and rules 34 to 36, shall have effect in relation to proceedings for taxation of those costs as they have effect in relation to proceedings for taxation of the costs of or arising out of proceedings in the High Court.

A (2) Subject to the express provisions of any written law and of these rules, the costs of and incidental to proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

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[19] Order 59 r. 2(2) of the Rules of the High Court 1980 expressly provides "subject to the express provisions of any written law". The express provisions of written law applicable in relation to priorities are as set out above, ie, ss. 264 and 292 of
C the Companies Act 1965.

[20] As can be seen from the annotation to O. 59 r. 2 of the Rules of the High Court 1980, the annotation referred to by the plaintiff no longer appears, is not applicable and is clearly not the
D correct statement of the law applicable in Malaysia. Likewise, the plaintiff's reference to s. 351 of the Companies Act 1965 does not lend support to his contention as it is a general provision and does not override the specific provisions relating to priorities, ie, ss. 264 and 292 of the Companies Act 1965: *generalia specialibus non*
E *derogant*. (Section 351 of the Companies Act is a provision for security for costs against a company who will be unable to pay the costs of the defendant if the defendant is successful in his defence. Subsection (2) of s. 351 is a general provision for costs of any proceeding under the Companies Act which shall be borne
F by such party to the proceeding).

[21] The Supreme Court in *Wong Pot Heng v. Zainal Abidin Putih & Anor* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 at p. 320 held that:

G When there is an express statutory provision relating to priority, we cannot displace or improve it by resorting to decided cases of common law jurisdiction unless there is a *lacuna* or ambiguities in our law ...

H **[22]** I have found no *lacuna* or ambiguities in our law relating to priorities and there is no change of law either on the status of a winding-up companies. The plaintiff made an application to court for leave to institute legal proceedings against the company. At that time the company has already been wound-up. Therefore, the
I law stands, ie, Part X of the Companies Act 1965 on winding-up and the Companies (Winding-up) Rules 1972 shall apply.

[23] Therefore, the plaintiff is not entitled to any priority of payment of his costs and/or an order to compel the liquidator to pay the said costs.

[24] The plaintiff's appeal is dismissed with costs.